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Blue Diamond Fiber Optics Network, Inc. and Communications Workers of America Local 1109, AFL-CIO. Case 2-CA-34938

July 31, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint. On a charge filed by the Union on October 3, 2002, the General Counsel issued the complaint on December 20, 2002, against Blue Diamond Fiber Optics Network, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On March 25, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On March 31, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Thereafter, on April 10, 2003, the General Counsel filed a renewed motion for summary judgment advising the Board that the original motion for summary judgment had been returned by the Post Office with a notation that there had been a change in the Respondent's address, and that the Region had also discovered yet another address for service of process on the Respondent. The General Counsel requested that an amended notice to show cause be served on the Respondent at the new addresses. A supplemental order transferring proceeding to the Board and Notice to Show Cause was issued April 11, 2003, and served on the Respondent at the new addresses. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer was filed by January 3, 2003, all

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the motion disclose that the Region, by letter dated February 20, 2003, notified the Respondent that unless an answer was received by March 3, 2003, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business located in Paterson, New York, has been engaged in the business of telephone interconnections.

Annually, the Respondent, in the course and conduct of its business operations described above, purchases and receives at its Paterson facility, products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Communications Workers of America, Local 1109, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees excluding clerical employees, sales and supervisors as defined in the Act.

Since about 2000 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been so recognized by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 25 through April 30, 2002.

At all times since 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

The collective-bargaining agreement between the Respondent and the Union, effective by its terms from January 25 until April 30, 2002, contained provisions, inter alia, for the payment of monies by the Respondent to the Union's health and pension funds on behalf of unit employees.

Since about June 2002, the Respondent has ceased making payments to the Union's health and pension funds.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective-bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct on the unit.

CONCLUSION OF LAW

By failing to make required payments to the Union's health and pension funds, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make required payments to the Union's health and pension funds on behalf of unit employees since about June 2002, we shall order the Respondent to make whole its unit employees by making all required payments to the Union's health and pension funds that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).² The Respondent shall also be required to reimburse unit employees for any expenses ensuing from its failure to make the required benefit fund payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

² To the extent that an employee has made personal contributions to a fund that were accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

ORDER

The National Labor Relations Board orders that the Respondent, Blue Diamond Fiber Optics Network, Inc., Paterson, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to make required payments to the Communications Workers of America, Local 1109, AFL-CIO health and pension funds on behalf of unit employees.

The appropriate unit is:

All full-time and regular part-time employees excluding clerical employees, sales and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required payments to the Union health and pension funds that have not been made since June 2002, and reimburse the unit employees for any expenses resulting from its failure to make the required payments, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Paterson, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2003

Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to make required payments to the Communications Workers of America, Local 1109, AFL-CIO health and pension funds on behalf of unit employees in the following unit:

All full-time and regular part-time employees excluding clerical employees, sales and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all required payments to the Union's health and pension funds that have not been made since June 2002, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required benefit fund payments, with interest.

BLUE DIAMOND FIBER OPTICS NETWORK, INC.